ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* BEECHER.

Opinion delivered February 19, 1898.

1. RAILROADS—DUTY IN OPERATING TRAINS.—A railway company, in operating its trains, is not bound to use the highest degree of care, diligence and skill, save as to passengers on its trains or those sustaining such relation to it. (Page 66.)

2. PASSENGER—WHO IS NOT.—One who has left the train and the depot platform, and is on the railroad track *en route* to her home, has ceased to be a passenger. (Page 67.)

3. INSTRUCTION—WHEN PREJUDICIAL.—An erroneous instruction is not cured by another instruction which is correct, if it cannot be said which influenced the jury. (Page 68.)

Appeal from Lawrence Circuit Court, Eastern District.

RICHARD A. POWELL, Judge.

Dodge & Johnson, for appellant.

The only class of persons to whom a railway company owes the exercise of "the highest degree of care, diligence and skill in running and operating its trains" is that of passengers. To all others it owes only ordinary care, etc. 46 Ark. 555; 48 Ark. 493; 59 Ark. 103; 48 Ark. 493; Sand. & H. Dig., § 6207; 49 Ark. 257; 54 Ark. 431; 11 C. C. A. 554; 34 Ark. 625. The relation of passenger and carrier had

ceased at the time of the accident. Hence, the court should not have given an instruction declaratory of a principle applicable solely to passengers. Such error is not cured by an instruction explaining the duration of the relation of carrier and passenger, and limiting the duty of the carrier to the exercise of reasonable precaution. The instructions are contradictory, and the jury might have been guided by either of them. Such inconsistency is error. 61 Ark. 155; 37 Ark. 580; 37 Ark. 593; 41 Ark. 281. It is error to give instructions on a state of facts not in evidence. 42 Ark. 3-7; 16 Ark. 651; 23 Ark. 289; 23 Ark. 73; 57 Ark. 289; 60 Ark. 557. An instruction which directs the jury to determine whether or not a lookout was kept by appellant, and that, if not, and plaintiff was killed by reason of such neglect, defendant is liable, ignores the defense of contributory negligence, and is erroneous. 62 Ark. 238; 62 Ark. 158; 61 Ark. 559; 62 Ark. 168. It is also error to declare that "all" persons running a train must keep a constant lookout. 62 Ark. 185.

J. M. Moore, J. K. Gibson and *W. B. Smith,* for appellee.

The relation of carrier and passenger had not terminated at the time of the accident. It is the duty of a railway company to provide and keep free from danger modes of egress from its grounds and depot; and so long as the passenger is in a situation such that these duties to him continue, his rights as a passenger have not ceased. 40 Barb. 550; 26 Iowa 124; 46 Ark. 195, 198; 59 Ark. 129; 129 Mass. 364; 6 Am. & Eng. R. Cas. 75; 84 N. Y. 241; 26 N. J. Eq. 474; 7 Vroom (N. J.), 532; 60 Ark. 110. The objection that the appellee failed to allege that deceased was a passenger at the time of the injury should have been made, if at all, on the trial. 44 Ark. 488; 42 Ark. 57. Even if all relation of carrier and passenger had ceased, an instruction requiring the highest degree of skill and care in the management of trains is not erroneous. The terms of the statute require a very great degree of precaution, and ordinary prudence demands a care commensurate with the danger of the circumstances. Hence it was proper to say that the defendant was held to the exercise of the "highest degree of care, skill and diligence which a pru-

dent man would exercise, and which is reasonably consistent with its mode of conveyance and the practicable operation of its road." 36 Ark. 45; 69 Ill. 412; 27 Gratt (Va.) 455; 4 Bissell, 433; 50 Mo. 461; 8 Am. & Eng. R. Cas. 280; 34 N. Y. 622; 67 N. Y. 420; 1 Am. & Eng. R. Cas. 155; 15 Am. & Eng. R. Cas. 374; 52 N. Y. 215; 48 Cal. 420; 70 N. Y. 123; 23 Am. & Eng. R. Cas. 308; 15 Am. & Eng. R. Cas. 376; 58 Ark. 470; 8 Am. & Eng. R. Cas. 445; S. C. 88 N. Y. 13. Even if the first instruction was abstract, it did not affect the decision of the case, and was harmless error. 58 Ark. 471; 62 Ark. 228; 54 Ark. 289; 56 Ark. 600; 8 Am. & Eng. R. Cas. 289. The deceased was not guilty of contributory negligence. 54 Ark. 165. Even if it were true that plaintiff's instructions were not strictly correct, defendants were more liberal than they should have been. Hence, defendant was not prejudiced. 46 Ark. 487; 59 Ark. 131; 46 Ark. 206; 8 Am. & Eng. R. Cas. 280.

BUNN, C. J. This is a suit for $15,000 damages to the next of kin for the killing of Rebecca Tackwell, plaintiff's intestate. Verdict and judgment for $1,500, and the defendant railway company appealed.

There is evidence to sustain the allegation that the deceased was killed by the negligent running and operation of defendant's train, and there is also evidence of contributory negligence on the part of the deceased which contributed directly to her death. This being true, and there being no question as to the admissibility of testimony offered in evidence, the case turns on the giving and refusing of instructions.

The first instruction given by the trial court at the instance of the plaintiff reads as follows, to-wit: "You are instructed that the defendant corporation is bound to use, in running and operating its trains on its road, the highest degree of care, diligence and skill which a prudent and cautious man would exercise, and which is reasonably consistent with its mode of conveyance and practical operation of its road." This instruction is not hypothetical in form, but seems to be intended as an assertion of an abstract proposition of law; but, even as an abstract proposition, it is erroneous; for, while it is appli-

cable and proper in the case of a passenger, it cannot be made to apply to the case of any other than a passenger or one sustaining the relation of a passenger to the railway company. It is in close accord with the direction of this court in the case of *Ry. Co.* v. *Sweet,* 60 Ark. 557, which was a case involving the killing of a passenger.

It is not the law that a railway company, in running and operating its trains, is bound to use the highest degree of care, diligence and skill, generally; for the railroad company owes no such duty to all the world, but only to a class of people, a very limited class in point of numbers,—passengers on its trains, or those sustaining such relation to it.

One of the principal questions in this case is whether or not the deceased, at the time of her death, was a passenger of defendant; and yet the instruction, in effect, was a declaration by the court to the jury that it made no difference whether she was a passenger, a traveler, or trespasser at the time, in so far as the degree of care, skill and diligence to be exercised by the defendant was concerned; for it made no distinction in favor of passengers, or against travelers and trespassers, in this regard.

The evidence showed that deceased, who had been a passenger on defendant's passenger train from Corning to Walnut Ridge depot, had left the train and the depot platform, and was on the railroad track *en route* to her residence in the town of Walnut Ridge, when she was run over and killed by the rear coach of said train, while the same was being moved backwards. The trial court, holding, in effect, that by this act she had ceased to be a passenger, gave the following instruction at the instance of the defendant, to-wit: "7. The relation of passenger to the defendant ceased after Mrs. Tackwell was safely discharged from the train at the place of her destination, and after she left the depot platform. If the evidence shows that the employees on the train that killed Mrs. Tackwell were in the ordinary discharge of their duties, and exercised reasonable diligence and precaution, the defendant is not responsible for unavoidable accident to the deceased, and your verdict will be for the defendant."

The fact that deceased had left the depot platform, and was on the railroad track *en route* to her home, is undisputed;

and she had ceased to be a passenger, under the rule which governs in such cases, and under which the instruction was given.

The error of the first instruction is thus made palpable, and, being radically wrong, its defect is not cured by any other instruction given; for, as in all such cases, it cannot be said certainly which of the instructions influenced the jury in making up their verdict.

Reversed and remanded for a new trial.